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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1577

GORDON R. KING,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioner, Gordon R. King, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Opinion Below

The opnion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of Virginia.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 24, 1973. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Whether evidence discovered by the police, not in, "plain view", and as a result of an illegal entry and search, can establish probable cause for the issuance of a subsequent search warrant.

Constitutional Provisions Involved

FOURTH AMENDMENT, U. S. CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

In the U. S. District Court for the Eastern District of Virginia, Gordon King was on June 9, 1972, convicted by a jury of knowing possession of an unregistered firearm (fragmentation hand grenade) in violation of 26 U.S.C. §§ 5861 (d) and 5871 and on July 7, 1972, received a sentence of eight years' imprisonment.

King was separately charged with possession, on March 6, 1972, at Pamela Worrall's apartment, of two hand grenades, merged into one count for purposes of verdict

and sentencing. Police found the live grenades during a March 6, 1972, search of Worrall's apartment for illegal drugs, the purported probable cause for which derived from a February 29, 1972, search thereof without a search warrant for a suspected bank robber named Garland.

Although the Court declined to suppress the grenades, the suppression hearing developed the following testimony. On February 26, 1972, FBI Agent Lennon obtained an *arrest* warrant for George Garland for armed robbery of an Arlington bank the day before. Agent Lennon gave the following reasons for searching Pamela Worrall's apartment for Garland:

1) Since sometime in January Garland had been staying at a motel on Route 1, from which he made five or six phone calls during this period of time to the Worrall apartment.

2) An unidentified informer stated that Garland was staying at a motel at an address where there was no motel, but rather the Worrall apartment building.

3) On February 26 Pamela Worrall had mentioned to an unidentified informer that her friend George had robbed a bank the night before.

4) A resident manager of Worrall's apartment stated that she had seen Garland in the building before, but did not say when.

The Court refused to hear what evidence supported the arrest warrant for Garland, whose home address was unknown to police, though they knew his car and had arrested him February 24. Before February 29 Agent Lennon had never heard of Gordon King, a suspected narcotics offender. To arrest Garland Agent Lennon and three other FBI agents received the assistance of Alexandria Detectives Turner and Nash, who knew Garland by sight. Turner and Nash were narcotics agents.

On February 29 these six law enforcement officers went

to Pamela Worrall's apartment building with the arrest warrant for Garland. A resident manager stated that she had not seen Pamela Worrall lately, who had taken a trip recently; nor did she say Garland had been there recently. Police entered the Worrall apartment with an office passkey though phone calls and knocks on the door went unanswered from a completely silent apartment.

Turner proceeded to the kitchen where to his right, about eight or nine feet above the floor, he saw a somewhat large, unique pipe on top of a cupboard or shelves above a counter. Turner then returned to the living room where he learned that the other officers and agents had searched the apartment and neither Garland nor anyone else was there. Thereafter Turner returned to the kitchen, climbed up onto the counter and examined the pipe. In the pipe bowl Turner saw burned residue and in a dish next to the pipe a small amount of stems and seeds. He did not see any unburned marijuana or marijuana leaves. The Court declined to hear what experience narcotics agents Turner had in identifying such material.

On the basis of what he had seen in the apartment on February 29, Turner on March 6 obtained a warrant to search the Worrall apartment for illegal drugs and related paraphernalia. Gaining entry as described on p. 15, *infra*, Detectives Turner and Nash with four other officers handcuffed Kink and searched the apartment thoroughly. Two hand grenades were found wrapped in a terrycloth towel inside a brown paper bag on a shelf just above eye level in the living room closet. Police discarded the towel and bag and left them in the apartment.

Going with Pamela Worrall since May, 1971, King had stayed overnight with her at her apartment at least seven or eight times in February and had free access to her apartment whether she was there or not. King last saw her on February 25. Aware that she was leaving town

February 27, King did not visit her apartment again until March 1, after which he visited it about three times up to March 6, twice encountering Mrs. Williford, who also had a key.

Aside from his presence in the apartment the only evidence linking King with the grenades was Mrs. Williford's testimony at the trial that after their discovery King told her: "I had those grenades up there. They took those grenades I had up there." (Tr. 295) King testified that he told Mrs. Williford "that they found some hand grenades up there and I stated to her that they are going to say they belong to me . . ." (Tr. 366) Mrs. Williford was the sister of Pamela Worrall, who had been charged with possession of the grenades found in her apartment. (Tr. 266)

At the trial Pamela Worrall testified that suspected bank robber Garland came to her apartment February 27 and stayed eight or nine hours before leaving with her for Florida, taking with him a paper bag. Three men had lived in her apartment and two had left belongings there during the past four and a half years, during which time she never changed her front door lock or cleaned out her closet. All three men, in addition to Worrall, King and Mrs. Williford, may have retained keys to this apartment.

When first interrogated as to the hand grenades, Worrall suggested they might have been in a bag supposedly containing a car alternator left by one of these men on the same shelf where the grenades were found. Except for money found by police, King had nothing in the apartment except a robe and an ash tray.

Reasons for Granting the Writ

1. Further explication by this Court of the "plain view" principle as applied to searches and seizures of

evidence, is essential for the guidance of those judicial officers called upon to evaluate such evidence.

2. Explication by this Court regarding the use of evidence seized by the police, to establish probable cause for the issuance of a subsequent search warrant, when such evidence was seized as a result of an illegal entry and search, is necessary for the guidance of police and other judicial officers.

The affidavit for search warrant of March 6 is primarily a recital of the purported probable cause for the February 29 search of the Worrall apartment for the suspected robber Garland. The only evidence offered to establish probable cause for the March 6 search was the allegation that the "pipe was found to contain what appeared to be marijuana residue. Also on top of the cabinet was a small amount of marijuana." Actually what Detective Turner saw was burned residue in the pipe and a small quantity of seeds and stems in the nearby dish; he saw no unburned marijuana or marijuana leaves. As he left the apartment Turner placed a one inch strip of tape between the frame and the upper right hand corner of the door.

Since police here sought a search warrant based on information now six days stale and inexplicably not acted upon previously, the affidavit included a statement that a daily check of the taped apartment door from February 29 to March 5 indicated that "no one had returned to the apartment since the door was secured on 3-29-72." in view of the fact that Mrs. Williford entered the apartment four times after it was taped (Tr. 286-288), that King visited the apartment at least four times from March 1 to March 6, and that Agent Lennon with Detectives Mackey and Barsher entered after it was taped, the prosecution conceded that "the tape gimmick did not work." Accordingly the only evidence for the March 6 warrant is

that six days previously Turner had seen burned residue in a pipe, and some seeds and stems. The Court refused to hear evidence as to Turner's experience in identifying marijuana because he was a narcotics agent.

Since the purported probable cause for the March 6 search derived solely from the February 29 search, and since there is no independent source of any probable cause evidence, *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, 392, 40 S. Ct. 182, 183 (1920), which might attenuate the link with or dissipate the taint from the February 29 search, *Nardone* v. *United States,* 308 U.S. 338, 341, 60 S. Ct. 266, 268 (1939), unless police knowledge of residue, seeds and stems was lawfully obtained, the grenades later seized are inadmissible as the fruit of the poisonous tree, *Wong Sun* v. *United States,* 371 U.S. 471, 485, 83 S. Ct. 407, 416 (1963).

Hence it becomes crucial whether the original February 29 entry into the apartment was lawful. The Court ruled, however, that "They had a warrant for his arrest and we are not going into why." This ruling was erroneous since the police were not rightfully in the Worrall apartment on February 29 unless they had probable cause to arrest Garland.

Even if police had probable cause to arrest Garland, the question remains whether they had probable cause to search this apartment. Police knew that since sometime in January Garland had been staying at a motel on Route 1, from which he called Pamela Worrall's apartment several times during this period, including once right after the robbery, according to the search warrant affidavit. On February 29 a resident manager informed Turner and Nash that she had seen Garland "in the building before" [not in the Worrall apartment as the Court insisted], but she did not say when.

Not appearing in the search warrant affidavit is the in-

formation received second-hand from an unidentified source that Garland was staying at a motel at a certain corner where in fact there was no motel but rather the Worrall apartment. Though Detective Turner knew nothing of Pamela Worrall before February 25, police similarly received second-hand information from an unidentified informer, also not mentioned in the affidavit, that the day after the robbery Worrall had mentioned at a party that her friend George had robbed a bank yesterday. Since these two tips were from an unidentified informer of unknown credibility or reliability, *Spinelli* v. *United States,* 393 U.S. 410, 416, 89 S. Ct. 584, 589 (1969), received by way of double hearsay, *United States* v. *Roth,* 391 F.2d 507, 510-511 (7th Cir. 1967), containing information of unknown recency, *Sgro* v. *United States,* 287 U.S. 206, 210, 53 S. Ct. 138, 140 (1932), they could not form even part of a lawful basis for a search of these premises for Garland, with or without a warrant.

Therefore the February 29 search of the apartment was based on information that Garland had called there, including right after the robbery four days earlier, and on a statement that Garland had been seen in the building, not recently, but merely previously. These two pieces of information could not give rise to the requisite reasonable grounds for belief that at the time of the search the sought-for person would be on the searched premises; and anything less than such a specific and reasonable belief, even a "strong reason to suspect," is insufficient for probable cause. *Henry* v. *United States,* 361 U.S. 98, 101, 80 S. Ct. 168, 170 (1959).

Detective Turner assigned as a reason for belief that Garland might be in this apartment the fact that "The vehicle used in the bank robbery was found abandoned next to [the apartment building]." Agent Lennon gave

the discovery of Garland's car, not as among his reasons for searching this apartment, but rather as the reason why he and Detectives Mackey and Barshar searched the Worrall apartment for Garland once on February 29 and once a day or two later. The Court refused to hear when they found the car. But the affidavit for search warrant lists the finding of a car nearby which Garland had used in a bank robbery as a reason why Agent Lennon engaged in the search of the apartment during which the pipe was seen.

Apparently when Detectives Mackey and Barshar found the car, they and Agent Lennon "on the spur of the moment" searched the apartment for Garland but found the pipe and related items. Then they called in the local narcotics detectives for a second "discovery" of evidence which could best be argued to constitute probable cause if seen by one with narcotics experience. This search by Lennon, Mackey and Barshar must have preceded rather than followed the one with Turner and Nash; for why would Lennon, Mackey and Barshar conduct a spur of the moment search of the apartment for Garland a second time on February 29 on the strength of finding his car, a discovery already made before the search in which Turner and Nash participated? (Search warrant affidavit)

It was no accident that narcotics detectives Turner and Nash were chosen to assist in this search, for Lennon had been in contact with Nash between February 25 and February 29. Lennon had little reason to believe Garland was there at the time of the search. The resident manager did not say that Garland or Worrall, who had taken a trip, had been there recently, yet they entered with a passkey though phone calls and knocks on the door went unanswered from a completely silent apartment. On similar facts it has been held there was no probable

cause to believe anyone was inside. *United States* v. *Watson,* 307 F. Supp. 173, 176 (D.D.C. 1969).

Turner and Nash visited the premises on the 25th, entered the apartment on the 29th and visited it daily thereafter. Lennon entered the apartment twice on the 29th and once the next day or two. Was there any more probable cause for one of these entries than the other? It appears that this apartment was under sufficient observation to have revealed the absence of Garland and the fact that King was a frequent visitor. Also, police knew Garland had been staying at a Route 1 motel and had arrested him on February 24; unless they had him under surveillance, how did they know that he "would not answer phones, he would not answer knocks to doors"?

Not all the facts of this case are clear. On the average of once every other page of the testimony of Turner, Nash and Lennon, the Court repeatedly declined to hear evidence, questioned the purpose of relevant evidence, admonished attorneys to "get on with it" and stop filibustering because "my patience is wearing real thin." Therefore it is respectfully submitted that, even though the defense may not have been a model of conciseness, doubt arising from any lack of evidence should be resolved in favor of appellant. Appellant is also hampered by not knowing the basis of the denial of the suppression motion, as it includes no findings of fact or conclusions of law. *Camacho* v. *United States,* 392 F.2d 575, 576 (9th Cir. 1968).

Even if police had probable cause to search the Worrall apartment for Garland, the question remains whether Detective Turner's discovery of the burned residue, seeds and stems was lawful. The Supreme Court has long permitted the observation of an item in "plain view" obtained during the course of a lawful search. *Harris* v. *United States,* 390 U.S. 234, 236, 88 S. Ct. 992, 993 (1968);

Ker v. *California,* 374 U.S. 23, 43, 83 S. Ct. 1623, 1635 (1963); *United States* v. *Lee,* 274 U.S. 559, 563, 47 S. Ct. 746, 748 (1927); *Hester* v. *United States,* 265 U.S. 57, 59, 44 S. Ct. 445, 446 (1924). The Supreme Court's most extensive discussion of "plain view" occurs in the more recent case of *Coolidge* v. *New Hampshire,* 403 U.S. 443, 465-473, 91 S. Ct. 2022, 2037-2042 (1971), wherein the Court pointed out as a requirement of this doctrine that:

> the discovery of evidence in plain view must be inadvertent [lest initially valid, limited searches turn into general ones] . . .
> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.

Inadvertence is recognized as a requirement in *United States* v. *Davis,* 461 F.2d 1026, 1035 (3rd Cir. 1972); *United States* v. *Drew,* 451 F.2d 230, 232 (5th Cir. 1971); *United States* v. *Sokolow,* 450 F.2d 324, 326 (5th Cir. 1971); *Marshall* v. *United States,* 422 F.2d 185, 189 (5th Cir. 1970) (the viewer must see "through eyes that are neither accusatory nor criminally investigatory"); *United States* v. *Broomfield,* 336 F. Supp. 179, 183 (E.D. Mich. 1972); *United States* v. *Esters,* 336 F. Supp. 214, 221 (E. D. Mich. 1972).

The evidence must also be immediately apparent.

> Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to an-

> other until something incriminating at last emerges. *Coolidge* v. *New Hampshire, supra,* at 403 U.S. 466, 91 S. Ct. 2038; see also *United States* v. *Drew,* 451 F.2d 230, 233 (5th Cir. 1971).

The Supreme Court also has held unequivocally that:

> it has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure . . . [citations omitted] *Harris* v. *United States, supra,* at 390 U.S. 236, 88 S. Ct. 993.

This rightful position requirement is recognized as well in *United States* v. *Molkenbur,* 430 F.2d 563, 566 (8th Cir. 1970), *cert. denied,* 400 U.S. 952, 91 S. Ct. 244 (1970); *United States* v. *Davis,* 423 F.2d 974, 977 (5th Cir. 1970) (termed "main consideration" in applying the plain view rule); *Marshall* v. *United States, supra; United States* v. *Grogan,* 293 F. Supp. 45, 46 (M.D. Ala. 1968). Apparently a policeman has limited leeway within which he can remain rightly positioned:

> That the policeman may have to crane his neck, or bend over, or squat, does not render the doctrine inapplicable, so long as what he saw would have been visible to any curious passerby. *James* v. *United States,* 418 F.2d 1150, 1151 (D.C. Cir. 1969).

But the policeman's hands, feet and eyes had better remain those of a curious passerby:

> [W]e . . . find real difficulty in holding that the agent's testimony concerning the existence of the initials on the gas tank and the tractor at the time he examined

> both in defendant's yard could be justified under the "plain view" theory. In one instance he had to move the equipment; in the other instance he had to look underneath the tractor. *United States* v. *Plunk,* 456 F.2d 1027, 1028 (6th Cir. 1972).

Many of the "plain view" cases involve evidence observed in cars parked in public places where a passerby who is not on private property might easily obtain an inadvertent view. *Speake* v. *Grantham,* 317 F. Supp. 1253, 1270 (S.D. Miss. 1970) (citing five circuit court decisions). Therefore this plain view doctrine must be applied more strictly to the search of the Worrall apartment than to a car. *United States* v. *Molkenbur, supra.*

The Supreme Court placed the plain view doctrine in the context of the constitutional requirement to keep searches "as limited as possible." Therefore a legitimate plain view must be obtained during "an appropriately limited search." *Coolidge* v. *New Hampshire, supra,* at 403 U.S. 466, 91 S. Ct. 2038; see also *United States* v. *Johnson,* 452 F.2d 1363, 1372 (D.C. Cir. 1971). The *Coolidge* Court considered the "inadvertence" and "immediately apparent" requirements as necessary to keep searches limited.

Since any intrusion by way of search is an evil, no intrusion is justified unless necessary, *Coolidge* v. *New Hampshire, supra,* at 403 U.S. 467, 91 S. Ct. 2038, resulting in a burden on the government which is "always heavy" when it urges any exception to the requirement of a warrant for a search. *United States* v. *Drew, supra.* The fact that the pipe and related material were not seized until later does not relax any of the above requirements because a quest for evidence of crime, such as examination of the pipe, is a search governed by the Fourth Amendment, *Marshall* v. *United States, supra,*

particularly during search of a home, *United States* v. *Molkenbur, supra.* An actual but reasonable expectation of privacy should protect an item from the plain view exception:

> Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he expose to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.
>
> *United States* v. *Grogan, supra,* at 47.

When Detective Turner entered the kitchen he saw the pipe on top of a cupboard or shelves above a counter, about eight or nine feet above the floor. This view of the pipe may well have been immediately apparent and inadvertent by one rightly positioned for the view during a search so far limited to Garland. But surely no magistrate would issue a search warrant on the basis of a pipe on a kitchen cupboard. Turner then left the kitchen and learned that the other officers and agents had completed their search of the apartment without finding Garland or anyone else. Since their only reason for being in the apartment was to arrest Garland, Turner's only possible justification for being there had vanished.

Yet, thus bereft of probable cause for his presence, Turner returned to the kitchen in a search for evidence. This Honorable Court is invited to picture the scene with Detective Turner climbing up on top of the counter so as to be able to examine the pipe on top of the cupboard above the counter. It was in this position that Turner handled and examined the pipe. Only now did he see burned residue in the pipe bowl. Only now was he able to discover a small amount of seeds and stems in

a dish. The residue, seeds and stems were hardly "immediately apparent" to Turner. His discovery of them was deliberate, not "inadvertent." His position on top of the counter was hardly one which he had a right to occupy, nor was this discovery made in the course of a search still appropriately limited to an attempt to arrest Garland. One would think that a pipe eight or nine feet off the floor inside a home would be covered by an expectation of privacy, and not by a "plain view" exception to a search warrant requirement. Can one imagine Detective Turner thus perched on the counter-top explaining to a returning home-owner that his non-accusatory and non-investigatory eyes were merely at that moment enjoying the inadvertent fruits of a plain view such as would be visible to "any curious passerby"? Since the probable cause evidence for the March 6 search warrant was therefore impermissibly obtained during the February 29 search, the grenades should have been suppressed, *Wong Sun* v. *United States, supra.*

Detective Turner executed the March 6 search warrant for drugs and related paraphernalia in the company of Detective Nash and four other officers. They knocked at the door for what King describes as ten seconds and they as several minutes without response, then directed a resident manager to open the door with a passkey. As she did so a chain prevented the door from opening completely. King approached the door asking who it was and Turner replied: police officers, open the door. Turner made no statement of his purpose. King opened the door, let them in, and asked what was going on. Responding that they had a search warrant, police handcuffed King and searched the apartment thoroughly.

Opening the door with the passkey constituted a breaking, *Ker* v. *California, supra,* at 374 U.S. 38, 83 S. Ct. 1632; *United States* v. *Sims,* 231 F. Supp. 251, 254 (D. Md.

1964). The grenades thereafter seized should be suppressed because, even should federal law not govern this arrest, police here violated the requirement of common law that before any breaking, police must make their presence, identity *and* purpose known. *Ker* v. *California, supra,* at 374 U.S. 39-40, 1623 S. Ct. 1633; *Miller* v. *United States,* 357 U.S. 301, 308, 78 S. Ct. 1190, 1195 (1958), *United States* v. *Sims, supra,* at 256; *United States* v. *Barrow,* 212 F. Supp. 837, 844-845 (E.D. Pa. 1962).

Conclusion

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL No. 143-72-A

UNITED STATES OF AMERICA

v.

GORDON R. KING

COMMONWEALTH OF VIRGINIA, CITY OF ALEXANDRIA

To the City Sergeant of the said City, or any Police Officer thereof:

Greetings:

Whereas Det. J. Turner of the said City, has this day made complaint, on oath, before me Arthur P. Gottwald, Special Justice of Peace in the said City, that he has just cause to believe that in a certain dwelling house, Apt. #1513 on the premises known as No. 5001 Seminary Rd., there is concealed illegally possessed controlled drugs, especially marijuana, and paraphernalia used to administer said controlled drugs.,

By one Pamela S. Worrall and whereas the undersigned is satisfied from said verified complaint that there is reasonable cause for such belief as evidenced by affidavit heretofore filed.

NOW THEREFORE; this warrant is to authorize and require in the name of the Commonwealth of Virgina, you to enter with all necessary and proper speed and assistance the said dwelling house, Apt. #1513, 5001 Seminary Road, Alexandria, Virginia, either in the day or night, and there diligently search for the said illegally possessed controlled drugs, especially marijuana, and paraphernalia used to administer said controlled drugs, and that the same or any

part thereof be found on said premises, that you seize and bring the same, and also the person or persons in whose possession the same may be found, before the Civil and Police Justice Court of the City of Alexandria, there to be disposed of according to law.

Given under my hand this 6th day of March, 1972. Time: 3:30 p.m.

(s) ARTHUR P. GOTTWALD
Special Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL No. 143-72-A

UNITED STATES OF AMERICA

v.

GORDON R. KING

AFFIDAVIT FOR SEARCH WARRANT

COMMONWEALTH OF VIRGINIA

CITY OF ALEXANDRIA, to-wit:

Before me, Arthur P. Gottwald, Special Justice of the Peace for the city aforesaid, this day personally appeared Detectives John W. Turner and Roy E. Nash, Alexandria Police Dept. and made affidavit as follows:

(1) Substantially, the offense in relation to which search is to be made.

Illegal possession of a controlled drug (Marijuana)

(2) The material facts constituting probable cause for issuance of the warrant.

On 2-25-72 Detectives John W. Turner and Roy E. Nash of the Alexandria Police Department received information from an Arlington County Police Detective that George Warner Garland, a former resident of Alexandria, Virginia was wanted for two counts of bank robbery, by the Federal Bureau of Investigation. It was also learned from the Arlington County Police Officer that George Warner Garland had been arrested in Prince George County, Maryland the previous day and had a phone number listed to Pamela S. Worrall at 5001 Seminary Road, Apartment #1513, Alexandria, Virginia.

Also, on 2-25-72 Detectives Turner and Nash went to 5001 Seminary Road, and learned from the resident

manager that apartment #1513 is leased to Pamela S. Worrall.

On 2-29-72 Detectives Turner and Nash went to 5001 Seminary Road, Alexandria, Virginia and met Agent Fred Linnon and three other F.B.I. Agents. Agent Linnon advised that he held two warrants for George Warner Garland charging bank robbery. Further, that he had knowledge that on 2-25-72 George Warner Garland phoned Pamela S. Worrall at 5001 Seminary Road, apartment #1513, phone # 578-0568, immediately after holding up a bank in Arlington, County. Agent Lennon advised the calls had been made to Miss Worralls apartment from the Wagon Wheel Motel on Route # 1 in Fairfax County, Virginia.

Further, a vehicle used to commit one of the bank robberies in which George Garland was wanted for was found near 5001 Seminary Road, Alexandria, Virginia.

Agent Lennon stated that for these reasons he felt George Garland may be in the apartment. A key to apartment #1513 was obtained from the resident manager. Detectives Turner and Nash, along with the F.B.I. agents went to apartment #1513 and knocked on the door for several minutes. No answer was received. At this time the key was used and Detectives Turner and Nash entered the apartment with the Agents of the F.B.I.

Upon entering the apartment Detective Turner went to the kitchen area and observed an unusual smoking pipe sitting on top of a kitchen cabinet. Upon closer examination the pipe was found to contain what appeared to be a marijuana residue. Also on top of the cabinet was a small amount of marijuana.

As George Garland, nor anyone else was found to be in the apartment, same was secured by Detective

Turner and a small piece of scotch tape placed on the door. In the event the door was opened this tape would be pulled loose from the frame.

The door was checked on a daily basis from 2-29-72 until 3-5-72 and was still intact on 3-6-72 indicating no one had returned to the apartment since the door was secured on 2-29-72.

(3) What is to be searched for under the warrant.

Any illegally possessed controlled drugs, especially marijuana and paraphernalia used to administer said controlled drugs.

(4) The house, place, vehicle or baggage to be searched.

Apartment #1513 located at 5001 Seminary Road, Alexandria, Virginia, which is under the control of Pamela S. Worrall.

DET. JOHN W. TURNER
DET. ROY E. NASH
Signature of Affiant

SUBSCRIBED and SWORN to before me this 6th. day of March, 1972.

(s) ARTHUR P. GOTTWALD
Special Justice
My Commission Expires:
August 24, 1974

CERTIFIED to the Clerk of the Corporation of the City of Alexandria, Virgina.

.....
Justice of the Peace

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL NO. 143-72-A

UNITED STATES OF AMERICA

v.

GORDON R. KING

MOTION TO SUPPRESS EVIDENCE

Comes now the defendant, Gordon R. King, by his attorneys, and moves this Court pursuant to the Fourth Amendment to the United States Constitution and the provisions of Rule 41(e) of the Federal Rules of Criminal Procedure to suppress as evidence any and all physical evidence taken, obtained or seized as the result of searches conducted in the execution of search warrants or incident to the defendant's arrest in the present prosecution. As reasons and grounds therefor, the defendant states as follows:

1. That on or about February 29, 1972, officers of the Alexandria Police Department and Federal law enforcement officers entered apartment 1513, 5001 Seminary Road, Alexandria, Virginia. As a consequence of a search made within the apartment at that time the officers of the Alexandria Police Department made an application on March 6, 1972 to a Special Justice of the Corporation Court of the City of Alexandria for a search warrant for the said apartment. The said warrant appears to have been issued.

2. That on March 6, 1972, the defendant was lawfully within apartment 1513, 5001 Seminary Road, Alexandria, Virginia (as a guest). That at that said time and place officers of the Alexandria Police Department and others entered the said apartment under color of the aforesaid search warrant.

3. That in the course of the execution of the said warrant, numerous physical items were seized from the said apartment, including: two alleged live hand grenades, which are the subject of counts one and two of the indictment herein; an alleged quantity of narcotic and controlled drug substances and alleged related paraphernalia; numerous miscellaneous papers and documents, which may be used as evidence by the Government in this prosecution, or which may have furnished leads in the accumulation of some of the Government's evidence; and other objects unknown to the defendant. The defendant's person was also searched and a seizure made of certain of his personal items.

4. That while the defendant was in custody on March 6, 1972 a report of his arrest and the seizure was made to certain Federal law enforcement officers. One of these officers, a special agent of the U. S. Bureau of Narcotics and Dangerous Drugs, made an application to a United States Magistrate for a warrant in order to make an additional search of the said apartment of "other items of a crucial evidentiary nature." A warrant to be executed at any time in the day or night was issued consonant with this application. The said warrant was executed in the nighttime with the result that more miscellaneous papers, records, etc. were seized, some of which the defendant believes will be used as evidence herein on which were used to obtain some of the Government evidence in this case.

5. That the initial entry into the apartment by officers on February 29, 1972, and their search of same were illegal under the laws of the Commonwealth of Virginia, the laws of the United States and the United States Constitution. The entry and search were made without a warrant or judicial order, sanction or approval of any type. That there was no adequate legal justification, nor probable

cause to sustain either the entry or the search. That if the entry was lawful, the search was illegal as exploratory, unreasonable, and not properly related nor incidental to the purposes of the entry.

6. The search warrant that was issued by the Special Justice on March 6, 1972 is itself illegal because it is substantially and materially tainted either by the unlawful entry and/or the illegal search of February 29, 1972. Independently, the said search warrant was improvidently issued upon inadequate probable cause. That the affidavit for the said search warrant contains a material misstatement or false statement of fact at the last paragraph thereof where it is suggested that, "no one had returned to the apartment since the door was secured on 3-29-72." That any probable cause that did exist for the search of the said apartment had dissipated as of March 6, 1972 when the warrant was issued.

7. That the search warrant issued by the United States Magistrate on March 6, 1972 was improvidently issued upon inadequate probable cause. That the issuance of the warrant under the circumstances existing at that time was illegal, as excessive, vexatious, unreasonable, harrassing and cumulative. That the said warrant was issued for the purpose of making an exploratory search and to make an evidentiary search, all of which are in violation of the Laws and Constitution of the United States. The issuance of a warrant to be executed in the nighttime and which was in fact executed at night was in violation of law.

8. That physical objects, items and objects were seized during the execution of the two said warrants that were not particularized in the said warrants, nor reasonably related to the property designated in the same to be seized, which said non-particularized articles were not contraband thus subject to be seized and which were purely evidentiary.

9. That the defendant verily believes that the two

aforesaid search warrants were predicated in material part upon evidence, information, intelligence and the like gathered by government agents by use of wire tap, electronic surveillance, bugging, eavesdropping, pen register devices and/or the like, all in violation of Amendment 4 of the United States Constitution, 18 U.S.C. Sec. 2510, et seq.

10. That the warrant of March 9, 1972 from the Special Justice was not sought or obtained in good faith, but rather upon the connivance, ruse, subterfuge and fraud of law enforcement officers and agents in an effort to obtain investigative leads on incriminative evidence against the defendant herein.

Respectfully submitted,

ROBERT M. ALEXANDER
2011 South Glebe Road
Arlington, Virginia 22204
920-7722

JOHN A. SHORTER, JR.
508 Fifth Street, N.W.
Washington, D.C. 20001
638-4040

Counsel for Defendant

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Motion were mailed, postage prepaid, this 3rd day of May, 1972 to the Office of the U. S. Attorney, and the Clerk of the Court, United States District Court, Post Office Building, Alexandria, Virginia.

. . . . . .

JOHN A. SHORTER, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL NO. 143-72-A

UNITED STATES OF AMERICA

v.

GORDON R. KING

ORDER

Upon the evidence presented and authorities cited, the Court is of the opinion that the defendant's motion to suppress the evidence seized during the search of Apartment 1513 at 5001 Seminary Road, Alexandria, Virginia, ought to be denied, and

It Is So Ordered.

The Clerk will send a copy of this order to the United States Attorney for this District and to counsel of record for the defendant.

(s) OREN R. LEWIS
United States District Judge

May 18, 1972

United States Court of Appeals
For the Fourth Circuit

No. 72-2031

UNITED STATES OF AMERICA,
APPELLEE,
v.
GORDON R. KING,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
Oren R. Lewis, District Judge.

Argued March 8, 1973. Decided April 24, 1973.

Before Haynsworth, Chief Judge and Russell and Field, Circuit Judges.

Gerald Alch (Mark J. Kadish and John R. Truman on brief) for Appellant; K. Gregory Haynes, Assistant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee.

PER CURIAM:

The only substantial question is the validity of a search of an apartment under a search warrant.

Armed with an arrest warrant for one Garland and having reason to believe that he was, or might be, present within the apartment, officers sought to serve it there. When there was no response to their knocking, they entered the apartment with the aid of a master key obtained from the apartment manager. Neither Garland nor anyone

else was present, but paraphernalia for use in smoking marijuana was observed in plain view. On the basis of that, a warrant to search the apartment for drugs was obtained. When the officers undertook to execute the search warrant, the defendant was in the apartment and during the course of the search, two unregistered hand grenades were discovered, and the defendant was later convicted of their unlawful possession.

We find no unreasonableness in the original entry under the arrest warrant in a search for Garland. The subsequent search warrant was validly issued and executed. Hence, the motion to suppress was properly denied.

We find no error in the trial.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1577

GORDON R. KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-28) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1973. The petition for a writ of certiorari was filed on May 23, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

QUESTION PRESENTED

Whether a search of an apartment with a warrant was invalid because based on evidence observed by police officers during a prior entry into the premises, with an arrest warrant, in search of a dangerous felon, or because of the manner in which the officers gained entrance when the search warrant was executed.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possessing two unregistered hand grenades, in violation of 26 U.S.C. 5861(d), and was sentenced to eight years' imprisonment. The court of appeals affirmed (Pet. App. 27-28).

The evidence adduced at trial and at a pretrial hearing on petitioner's motion to suppress showed that on February 25, 1972, a bank in Arlington, Virginia was robbed. State police investigating the robbery determined that it had been committed by one George Garland, who had been residing under an assumed name at a motel (H. 23-25).[1] Further investigation revealed that Garland had made several calls from the motel to an apartment leased to Mrs. Pamela Worrall, located at 5001 Seminary Road, Alexandria, Virginia; that one call had been made immediately after the robbery; that Garland might have been staying at the Worrall apartment; and that on the day after the robbery Mrs. Worrall was overheard commenting that her friend, Garland, had committed a bank robbery (H. 26-27). In addition, Garland's car was located in the parking lot of the apartment house (H. 32-33, T. 37).

On February 29, local and federal officers, armed with a warrant for Garland's arrest, went to the office of the resident manager of Mrs. Worrall's apartment building. After learning that Garland had recently been

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[1] "H." refers to the transcript of the pretrial hearing, with the exception of the separately paginated transcript of testimony by detective John W. Turner ("T."). "Tr." refers to the transcript of trial. A copy of each of these is being lodged with the Clerk of this Court.

seen in the building (T. 10), the officers attempted to execute the warrant. Although they believed that Garland would not answer telephones or respond to knocks on the door, the officers nevertheless first telephoned the apartment from the resident manager's office. Receiving no answer, the officers went upstairs and knocked on the door of Mrs. Worrall's apartment for several minutes. Again there was no response (H. 28-31). They then used a pass key to open the door. While searching for Garland, Alexandria detective John Turner saw in plain view on top of a kitchen cupboard a large and unusual smoking pipe. On closer inspection of the pipe, detective Turner found marijuana residue in the pipe bowl and marijuana stems and seeds in a dish beside the pipe (T. 15-16, 19). No one was found in the apartment. The pipe and marijuana were left behind, and a piece of cellophane tape was attached to the door and door frame in a manner designed to give evidence of any entry into the apartment (T. 24).

For the next several days, detective Turner and other local officers with him made daily checks of the apartment, and found the tape on the door apparently intact when they passed by (T. 25-26). In fact, however, between February 29 and March 6 the door had been opened several times. During this period, Mrs. Worrall and Garland were vacationing in Florida (Tr. 237, 255). Both petitioner, who paid the apartment rent and a $100 weekly allowance to Mrs. Worrall (Tr. 231-232), and the latter's sister, Mrs. Malinal Williford, had keys to the apartment and had visited the apartment during the week prior to March 6, 1972.

On March 6, at about 1:00 p.m., Mrs. Williford met petitioner at the apartment for the purpose of receiving

$320 to be wired by her to her sister in Florida (Tr. 293). She left at approximately 2:30 p.m. and, at 4:00 p.m., telephoned the apartment to inform petitioner that the money had been sent (Tr. 294).

Earlier that same day, detectives Turner and Roy Nash submitted their affidavit (Pet. App. 19-21) to a local justice of the peace, who thereafter issued a warrant authorizing them to search Mrs. Worrall's apartment. At approximately 4:30 p.m., several Alexandria police officers, including Turner and Nash, attempted to execute the warrant. They knocked on the door for several minutes and received no response (T. 27-28). Then a pass key was inserted into the door lock by the resident manager, and the door opened slightly; an inside chain latch prevented the door from opening further. Petitioner was observed on the living room sofa. He asked who was there, and Turner replied, "Police officers, open the door" (T. 29). Petitioner complied. He was then informed of the warrant, and the search of the apartment ensued (T. 38-39). Two live hand grenades were discovered in the living room closet wrapped in a towel inside a paper bag (H. 29-30; Tr. 197-198).

The following day, petitioner met Mrs. Williford outside the apartment building and informed her of the police search. Petitioner said, "I'm really worried. I had those grenades up there. They took the grenades I had up there" (Tr. 295). Two days later, when Mrs. Williford informed petitioner that the police intended to interview her, petitioner gave her a telephone number where he could be reached and said, "Don't say anything. You don't even know me" (Tr. 300-301).

In his defense, petitioner admitted his association with Mrs. Worrall and his free access to her apartment bu

denied keeping any personal possessions in her apartment other than more than $60,000 found there in the course of the search. Petitioner claimed that he never opened the living room closet and denied knowing that the grenades were there (Tr. 356-383). In rebuttal, a police detective testified that in response to police questioning after his arrest, petitioner denied having an apartment key, knowing who resided there, or owning the $60,000. Petitioner told the police officer that he had been admitted to the apartment by an unknown friend (Tr. 397-399).

ARGUMENT

Petitioner maintains that the February 29 entry into the apartment in search of Garland was illegal because there was no probable cause to believe Garland was there, that the discovery at that time of the marijuana atop a cupboard shelf was not lawful under the plain view doctrine, and that the March 6 search disclosing the hand grenades was invalid because it was based upon the prior allegedly illegal entry and because the police had failed to make their purpose known before entering the premises. None of these claims has merit. The police acted reasonably and pursuant to valid warrants in all phases of the investigation.

1. The information known to the police about Garland, the bank robber, when they made their entry into Mrs. Worrall's apartment on February 29 was sufficient to provide a reasonable basis to believe that Garland may have been inside. That information, obtained from police investigation and reports of informants, included knowledge that Garland had made several recent telephone calls to the apartment; that the resident manager of the apartment building had recognized

Garland's photograph and had stated that she had see him in the building "recently" (T. 10); that Garland' automobile had been found on the parking lot of th apartment house; that Garland was supposedly stayin in the area of the apartment building; and that Pamel Worrall had been heard to state that Garland, he "friend," had robbed a bank. Because ample caus existed for the police officers to believe that Garlan was in Mrs. Worrall's apartment, their entry therei was lawful. See *Warden* v. *Hayden,* 387 U.S. 29 *United States* v. *Price,* 345 F. 2d 256, 259 (C.A. 2 *United States* v. *Sims,* 231 F. Supp. 251, 254 (D. Md.)

2. Having made a lawful entry into the apartmen without encountering anyone, the police officers acte reasonably in making a search of the premises for th felon. *Warden* v. *Hayden, supra.* When, in the cours of that search, a police detective with narcotic experience observed a unique smoking pipe in plai view atop a kitchen cupboard, his conduct in returnin to the kitchen to examine the pipe after the fruitles search for the felon had been completed cannot fairl be deemed to be unreasonable. Detective Turner actions fall well within the plain view doctrine, whic "has been applied where a police officer is not searchin for evidence against the accused, but nonetheless i advertently comes across an incriminating object *Coolidge* v. *New Hampshire,* 403 U.S. 443, 466.

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[2]*United States* v. *Watson,* 307 F. Supp. 173 (D.D.C.), relie upon by petitioner (Pet. 10), is not in conflict with the governmen argument. In *Watson,* Judge Gasch ruled that officers with a arrest warrant should not have entered an apartment when th had no reason to believe anyone was inside. However, Jud Gasch agreed that entry is lawful if a policeman "has reasonab cause to believe the defendant is within" (*id.* at 175).

Recognizing that the initial observation of the unusual smoking pipe would be deemed inadvertent, petitioner claims nevertheless that the officer had no right to examine it when it was out of his reach on top of the cupboard, and that detective Turner's discovery of the marijuana by climbing on the counter to lift the pipe down was therefore unlawful (Pet. 14). Contrary to that contention, the plain view doctrine has never been so restricted as to forbid a closer inspection of an incriminating object found in plain view. See *United States* v. *Drew*, 451 F. 2d 230 (C.A. 5).

3. The affidavit submitted by detectives Turner and Nash supporting the warrant issued on March 6 to search Mrs. Worrall's apartment for narcotics contained information regarding the pursuit of George Garland to this apartment, the entry on February 29 and discovery of the smoking pipe and marijuana, and the use of cellophane tape on the door and door frame, coupled with daily checks of the door which gave the detectives reason to believe that no one had entered the apartment since February 29 (Pet. App. 19-21). Certainly those averments, based largely upon the personal activities of the affiants, furnished probable cause for a detached judicial officer to issue a warrant. The information was not, as petitioner alleges, "stale" (Pet. 6) because the events had occurred six days before, particularly in light of the statements that the officers had strong reason to believe that no one had entered the premises since they had last observed the contraband. See *United States* v. *Guinn*, 454 F. 2d 29, 36 (C.A. 5), certiorari denied, 407 U.S. 911; *Coury* v. *United States*, 426 F. 2d 1354 (C.A. 6). The fact that this information proved to be erroneous because of circumstances unknown to the affiants (T. 23-26) did

not affect the integrity of the affidavit or negate the validity of its issuance. *Rugendorf* v. *United States*, 376 U.S. 528, 532.

4. Although they evidently expected the apartment to be unoccupied on March 6, the policemen knocked on the door for several minutes before attempting to gain entrance with a pass key. When the lack of any response to their knocking had indicated that no one was inside, the officers could rightfully expect that any announcement would serve as a useless gesture. *United States* v. *Hawkins*, 243 F. Supp. 429 (E.D. Tenn.); *United States* v. *Watson*, 307 F. Supp. 173, 176, n. 2 (D.D.C.); cf. *United States* v. *Gervato*, 340 F. Supp. 454 (E.D. Pa.). When they unexpectedly found the entrance barred from within by a chain latch, the police officers properly made no further attempt to enter on their own. They instead identified themselves, waited for petitioner to unlock the door, and presented him with a copy of the search warrant before beginning their search. That conduct cannot fairly be deemed unreasonable or violative of petitioner's right to privacy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
MERVYN HAMBURG,
Attorneys.

JULY 1973.

DOJ-1973-07